

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANT FACEBOOK, INC.'S
OBJECTION TO MACDONALD
FERNANDEZ'S VERIFIED STATEMENT OF
DISQUALIFICATION**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

1 **I. INTRODUCTION**

2 Six4Three’s limited-scope counsel’s “Verified Statement of Disqualification” is improper and
3 should be stricken. Statements of disqualification have no place in peremptory challenges: Such
4 statements exist to facilitate challenges *for cause*, which cannot proceed without a list of the facts
5 “constituting the grounds for disqualification of the judge.” *See* Civ. Proc. Code § 170.3(c)(1). But
6 Six4Three’s new lawyers at Macdonald Fernandez LLP have not filed such a challenge. And they have
7 no grounds on which to do so. The Court should therefore strike Macdonald Fernandez’s “verified
8 statement” as improper.

9 **II. ARGUMENT**

10 **A. Factual Background.**

11 This Court is familiar with recent developments in this case. After this Court ordered Six4Three
12 to find substitute counsel, Six4Three retained Macdonald Fernandez on June 28, 2019. *See* Decl. of
13 Theodore Kramer re Order regarding Retention of Counsel by Pl. Six4Three, LLC ¶ 2 (July 1, 2019).
14 The firm filed a notice of appearance on July 2. That same day, the firm also filed a peremptory
15 challenge pursuant to Civil Procedure Code section 170.6. Facebook filed an opposition to the challenge,
16 Macdonald Fernandez replied, and the Court struck the challenge as untimely on July 9, 2019. This
17 dispute arises from Macdonald Fernandez’s response to that July 9 Order.

18 Three days after the Court struck Macdonald Fernandez’s peremptory challenge, the firm filed a
19 “Verified Statement of Disqualification” pursuant to Code of Civil Procedure § 170.3(c)(1). Verified
20 Statement at 1 (July 12, 2019). For the reasons that follow, that “verified statement” is improper and
21 should be stricken.

22 **B. Macdonald Fernandez’s Verified Statement of Disqualification Is Improper and**
23 **Should Be Stricken.**

24 California’s Code of Civil Procedure devotes a specific chapter to “Disqualifications of Judges.”
25 That chapter opens with the command that “[a] judge *has a duty to decide* any proceeding in which he or
26 she is not disqualified.” Civ. Proc. Code § 170 (emphasis added). The chapter goes on to grant courts
27 the power to strike a statement of disqualification if “a statement of disqualification is untimely filed or if
28

1 on its face it discloses no legal grounds for disqualification[.]” Civ. Proc. Code § 170.4(b). Here, the
2 Court can and should strike Macdonald Fernandez’s statement.

3 Macdonald Fernandez styles its pleading as a statement pursuant to Civil Procedure Code section
4 170.3(c). See Verified Statement at 1. But that section governs challenges for cause—not peremptory
5 challenges. See *California Judges Benchbook: Civil Proceedings - Before Trial* § 7.14 (Foundation for
6 Judicial Education 2019) (“The grounds for disqualification of a judge *for cause* are set out in detail in
7 CCP § 170.1 . . . , and the procedure to be followed is set out in CCP § 170.3.”) (emphasis added). The
8 text of the section makes this distinction clear: Section 170.3(c)(2) describes the options available to “a
9 judge *whose impartiality has been challenged by the filing of a written statement*[.]” Civ. Proc. Code
10 § 170.3(c)(2) (emphasis added).

11 The statute’s structure confirms this reading: Section 170.3(c)(1), which Macdonald Fernandez
12 invokes, requires that the statement set forth “facts *constituting the grounds for disqualification*[.]” *Id.*
13 (emphasis added). That language is a direct reference to immediately preceding sections 170.1
14 (“*Grounds for disqualification*”) and 170.2 (“*Circumstances not constituting grounds for*
15 *disqualification*”) (emphases added). Those sections, in turn, recite circumstances indicative of
16 prejudice of bias. See also Civ. Proc. Code § 170.1(a) (listing “grounds for disqualification” that include,
17 *inter alia*, when “[t]he judge has personal knowledge of disputed evidentiary facts” and when “[t]he
18 judge has a financial interest in the subject matter in a proceeding”). Unsurprisingly, California’s courts
19 of appeal uniformly describe section 170.3(c) as the procedure used to strike judges for cause. See *Tri*
20 *Counties Bank v. Superior Court (Amaya-Geunon)*, 167 Cal. App. 4th 1332, 1337 (2008) (“A party may
21 seek a judge’s disqualification *for cause* under the procedure set forth at section 170.3, subdivision (c)”)
22 (emphasis added).

23 The problem, of course, is that Macdonald Fernandez says that it has not filed a challenge for
24 cause. The firm’s “verified statement” purports to be “pursuant to Code of Civil Procedure
25 § 170.3(c)(1),” but the firm expressly “*reserve[d] its right to seek disqualification for cause pursuant to*
26 *Code of Civil Procedure § 170.1*.” Verified Statement ¶ 6 (emphasis added). Macdonald Fernandez’s
27 only gripe with the Court is that the Court (properly) struck the firm’s untimely peremptory challenge.
28 See *id.* ¶ 3. But that’s not grounds for disqualification. On this point, section 170.2 could not be clearer:

1 “It shall not be grounds for disqualification that the judge: . . . (b) *Has in any capacity expressed a view*
2 *on a legal or factual issue presented in the proceeding[.]*” Civ. Proc. Code § 170.2(b) (emphasis
3 added).¹ The Court’s ruling on Macdonald Fernandez’s peremptory challenge cannot support a
4 challenge under section 170.3(c). *See supra*. For that reason, the firm’s statement should be stricken.

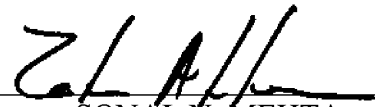
5 **III. CONCLUSION**

6 For the reasons above, Macdonald Fernandez’s improper “Verified Statement of Disqualification”
7 should be stricken.

8
9 Dated: July 17, 2019

DURIE TANGRI LLP

10
11 By: _____



SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

ZACHARY G. F. ABRAHAMSON

14 Attorneys for Defendants
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16 Javier Olivan, Samuel Lessin, Michael Vernal, and
17 Ilva Sukhar

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25 ¹ Even if the firm *could* use section 170.3(c) to collaterally attack the Court’s section 170.6 ruling—it
26 cannot—Macdonald Fernandez’s “verified statement” improperly purports to “incorporate[] by
27 reference” the firm’s Reply in Support of Peremptory Challenge. *See* Verified Statement ¶ 3. As this
28 Court has held in other circumstances, California law does not permit such casual incorporation. *See*
Order (1) Denying Defendant Facebook, Inc.’s Special Mot. to Strike at 10:22–23 (July 16, 2018)
 (“Plaintiff provides no legal authority to support incorporation of arguments raised in other motions.”).
 Accordingly, neither this nor any court would consider the merits of Macdonald Fernandez’s section
 170.6 briefing in connection with the firm’s section 170.3 challenge.

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On July 17, 2019, I served the following documents in the manner described below:

6 **DEFENDANT FACEBOOK, INC.'S OBJECTION TO MACDONALD
7 FERNANDEZ'S VERIFIED STATEMENT OF DISQUALIFICATION**

8 ☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business
9 practice of Durie Tangri LLP for collection and processing of correspondence for overnight
10 delivery, and I caused such document(s) described herein to be deposited for delivery to a
11 facility regularly maintained by Federal Express for overnight delivery.

12 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
13 Durie Tangri's electronic mail system from cortega@durietangri.com to the email
14 addresses set forth below.

15 On the following part(ies) in this action:

16 **VIA OVERNIGHT MAIL & EMAIL**

17 Reno F.R. Fernandez III
18 Matthew J. Olson
19 Macdonald Fernandez LLP
20 221 Sansome Street, Third Floor
21 San Francisco, CA 94104
22 Reno@MacFern.com
23 Matt@MacFern.com

24 *Attorneys for Plaintiff Six4Three, LLC*

25 **VIA EMAIL ONLY**

26 Stuart G. Gross
27 GROSS & KLEIN LLP
28 The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

VIA EMAIL ONLY

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

VIA EMAIL ONLY

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

VIA EMAIL ONLY

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 **VIA EMAIL ONLY**

2 Donald P. Sullivan
3 Wilson Elser
4 525 Market Street, 17th Floor
5 San Francisco, CA 94105
6 donald.sullivan@wilsonelser.com
7 Joyce.Vialpando@wilsonelser.com
8 Dea.Palumbo@wilsonelser.com

9 *Attorney for Gross & Klein LLP*

10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct. Executed on July 17, 2019, at San Francisco, California.
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Christina Ortega